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ARE OUR LEGAL-TENDER LAWS *EX POST FACTO*?

NO principle of legal interpretation is better established or has received a wider acceptance than this, that the intention of the framers of a legal instrument is decisive of its meaning and ought to be held inviolable, regardless of technicalities. In other words, the misuse of a technicality ought not to defeat the plain intention of the framers of a legal instrument. By this principle I propose to try the question at the head of this article. Waiving for the present the question whether the phrase *ex post facto* had become a technical or restricted term in good legal usage prior to the formation of our national constitution, it is proper to decide: What did the framers of the constitution intend by the term?

There are in the constitution two provisions that contain the term *ex post facto*. Each was adopted by the votes of seven states against three. It is demonstrable that, when the convention first adopted these provisions, it understood the term to be properly applicable to any retrospective or, to use a better word, retroactive law.

In the provision of Article I, Section 10, that "no state shall pass any bill of attainder or *ex post facto* law," the second expression was especially aimed against any law impairing the obligation of preëxisting contracts. The convention was considering a motion by Mr. King to forbid interferences in private contracts by state legislatures. Objection being raised to the word "interfere," as carrying the prohibition too far, a motion was made to substitute the term "*ex post facto*," so that the clause as amended read thus: "No state shall pass any bill of attainder or *ex post facto* law."¹ This wording, as a substitute for "no state shall pass any law interfering in private contracts,"

¹ Madison's Journal of the Debates, Gilpin's ed., pp. 1443, 1444; Elliot, V. 485.

would have been wholly irrelevant, if *ex post facto* had been regarded as applicable to "criminal law and criminal proceedings only." It is manifest that the amendment must have been accepted by the convention as in line with the original motion. So far as my knowledge extends, no person of eminence or authority has ever questioned this position. Indeed, it has been admitted by high authority, even among those who hold to the constitutionality of our legal-tender laws, that Article I, Section 10, of the constitution was originally intended to forbid the impairment of the obligation of contracts by state legislation.

But it is equally manifest that the original intention of the convention in adopting Article I, Section 9, "no bill of attainder or *ex post facto* law shall be passed," was to forbid the impairment of the obligation of contracts by national legislation. For the amendment of the motion to prohibit the states from "interfering in private contracts" was borrowed from Article I, Section 9, without change, except to make it apply to the states.¹ If the phrasing of Section 9, "no . . . *ex post facto* law shall be passed," had been applicable to retroactive criminal law only, it would not have been borrowed for use against retroactive civil law. Since no one in the convention saw any incongruity in the second use of the borrowed phrase, the original sense of the expression is beyond reasonable dispute.

Not only was the provision in Section 10 borrowed without essential change from Section 9, but the act of borrowing was accompanied with an express interpretation of the nature and design of the words borrowed. In answering objections to the word "interfere," as carrying the prohibition too far, "Mr. Wilson replied that retrospective interferences only are to be prohibited." Mr. Madison replied: "Is not this already done by the prohibition of *ex post facto* laws, which will oblige the judges to declare such interferences null and void?"

It is obvious that Mr. Madison referred to Section 9, and he plainly regarded it as prohibiting retrospective interferences in

¹ See Madison's Journal, Session of August 28, Chicago ed., 1893, p. 621; or Gilpin, 1444; also Elliot, 485.

private contracts. This reference to and interpretation of Section 9 suggested the amendment I have spoken of, and occasioned its adoption by so large a majority of the states. For, in immediate response to Mr. Madison's remarks, Mr. Rutledge moved, instead of Mr. King's motion, to insert "nor pass bills of attainder nor *ex post facto* laws," as it is in the printed Journal;¹ or, as it is in Madison's Journal, "nor retrospective laws."²

The fact that Mr. Madison uses "retrospective laws" and the printed Journal "*ex post facto* laws," in recording the motion of Mr. Rutledge, is additional proof that "*ex post facto*" and "retrospective" were then regarded as equivalent terms, not by Mr. Madison alone, but also by the convention itself. Further proof is also found in an event of the following morning session of August 29. Mr. Dickinson

mentioned to the House that on examining Blackstone's *Commentaries*, he found that the term *ex post facto* related to criminal cases only; that they would not consequently restrain the states from retrospective laws in civil cases, and that some further provision for this purpose would be requisite.³

It is plain that Mr. Dickinson supposed that the convention had intended by the phrase "*ex post facto* law," in Section 10, to "restrain the states from retrospective laws in civil cases," but had made a mistake in the use of a term. The fact that Mr. Dickinson's understanding of the object of the provision passed without dissent from any one, is not consistent with the idea that he had made a mistake, at least in this respect.

The question now arises: Did the convention, by any subsequent action, expressly or impliedly renounce, or even qualify, the original purpose of either provision in the constitution containing the phrase *ex post facto*? This double question must be answered by a decided negative. Without the knowledge of Supreme Court decisions, one would be at great loss to know what to fasten upon, as even suggesting a change of

¹ See Elliot, I, 271. Compare Elliot, I, 257.

² Gilpin, 1444, Chicago ed., p. 621.

³ Madison's Journal, Chicago, 1893, p. 625; Gilpin, 1450; Elliot, 488.

mind on the part of the convention respecting either of the two provisions under consideration. Did some shrewd advocate persuade the court that Mr. Dickinson's statement of his notion, respecting the proper use of *ex post facto*, was an end of all mental question or dissent in that convention of well-trained, eminent, self-reliant lawyers? It is certainly not reasonable to suppose that they would confess to a misunderstanding and misuse of so venerable a term as *ex post facto*, on the mere momentary impression of a man in no way superior to themselves. They would want more evidence than Mr. Dickinson had to offer. I say "momentary impression"; for the recess of the convention for a single night could have given Mr. Dickinson opportunity for only a superficial examination. Or if, on personal investigation, the other members had become conscious of having committed a blunder, would they, merely for fear of being chargeable with ignorance, have renounced, without one contending word, an object of great importance, not only to themselves, but also to coming generations, and an object for which some of them had contended earnestly? Would they not have substituted some other term for "*ex post facto*," in order to secure that object?

The observation of Mr. Dickinson does not appear to have had any important effect upon the collective mind of the convention, either at the time it was spoken or afterwards. So far as can now be known, it influenced only three men, and one of these in the way rather of doubt than of conviction. After the constitution was adopted in substance, and with careful wording but without careful arrangement, it was referred to a committee on style and arrangement, of which Gouverneur Morris was the working member. Of his own will he added an explanatory clause after "*ex post facto* law," in Article I, Section 10, in the following words: "or law altering or impairing the obligation of contracts."¹ Having received the approval of the committee, this was accepted by the convention, with the omission of the word "altering."

As this committee was not empowered to add any new or

¹ Gouverneur Morris, by Sparks, III, 323.

distinct provision to the constitution, and as the addition in question provoked no discussion or opposition in the convention, but passed apparently without a vote, it is obvious that it added no essential idea to the constitution, but was regarded by every one as simply explanatory of the especial object which the convention had in view in its first action. It is hardly susceptible of a doubt that, if the report of the same committee had included the same explanatory clause in Section 9 also, it would have passed, *nemine contradicente*. That it did not there appear is explained by the fact that Gouverneur Morris had objected to the adoption of this provision in the first place, regarding it as "unnecessary."¹

It is worthy of consideration that, *prior* to the adoption of this explanatory clause, Colonel Mason moved to strike out of Section 9 the words, "nor any *ex post facto* law." He thought it not sufficiently clear that the prohibition meant by this phrase was limited to cases of a criminal nature; and "no legislature ever did or can altogether avoid them in civil cases."² Colonel Mason's motion was seconded by Mr. Gerry for just the opposite reason, lest the prohibition should *not* extend to civil cases. This motion received a unanimous negative.³ If the convention had changed its mind respecting this prohibition and at this time had desired that it should extend to cases of a criminal nature only, was not this a favorable opportunity? Therefore, this vote cannot be explained on the supposition that the convention had, in agreement with Colonel Mason, become apprehensive of the unwisdom of restraining Congress from enacting laws impairing the obligation of contracts. For certainly it is much more credible that the delegates of three states should have concluded to give up their ineffectual opposition than that the delegates of seven states should have changed their minds and renounced their purpose upon a mere notion without evidence. This vote *not* to strike out "*ex post facto* law" from Section 9, considering the reasons offered to the contrary, together with the fact that

¹ See Madison's Journal, Session of August 22, Chicago ed., p. 586.

² Madison's Journal, p. 727. ³ *Ibid.*, p. 728.

no one offered any amendment to Colonel Mason's motion, was equivalent to a vote that said provision should remain with its original intent unchanged. This vote, occurring very shortly before the acceptance of the explanatory clause of Gouverneur Morris, explains why the motion of Mr. Gerry, offered immediately afterward, to insert the same explanation in Section 9, received no second—a fact that was forced into unnatural service in the opinion delivered by Justice Gray in the case of *Juilliard vs. Greenman*.¹ For it was not to be expected that, after the convention had just voted unanimously that said provision should remain unchanged, they would return to it again.

No member of the Federal Convention was better qualified to declare what was the final purpose of the convention than James Madison. In Number 44 of *The Federalist* Mr. Madison approves of the prohibition of the issue of bills of credit by the states, and declares that the emission of such bills by the states in preceding years “constitutes an accumulation of guilt which can be expiated no otherwise than by a voluntary sacrifice on the altar of justice of the power which has been the instrument of it.” Inasmuch as the Federal Convention, in its session of August 16, refused to grant Congress the power to emit bills of credit, and inasmuch as all bills of credit of that time were calculated to impair the obligation of contracts, the words of Madison, quoted above, have a decisive effect on this question. For the idea of “an expiatory sacrifice on the altar of justice” of that power is utterly repugnant to the idea of a mere transfer of the power to the national government. Hence, Madison could not have known of any action, or default of action, subsequent to August 16, virtually reconsidering and reversing the vote to refuse Congress the power “to emit bills.” But “bills of credit” of that time meant a tender for public and private debts. They did not mean promissory notes, either public or private, given as evidence of indebtedness, but not intended for circulation. They meant legal-tender promissory notes, notes intended for circulation, a *currency*. If there was a bill of credit of that decade without the legal-tender quality, it

¹ 110 U. S. 421.

had what was equivalent to it — a circulation enforced by other penalties. There was not a note or a bill existing at that time so secured as to be immediately exchangeable into coin at its face value, and therefore with a circulation *free*. This fact decisions of the Supreme Court can neither make nor unmake, and this fact determines the constitutional sense of “bill of credit.”

In the same number of *The Federalist* Mr. Madison says: “Bills of attainder, *ex post facto* laws and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation.” These and his subsequent words show that Mr. Madison was positive that the constitution had not left in the hands of Congress, either through default or through conscious intention, either by implication or expression, the power or right to enact laws impairing the obligation of contracts, any more than that it had given Congress the power to enact bills of attainder.

The evidence, thus, is very strong that the convention did not accept the view of Mr. Dickinson respecting the use of *ex post facto*, and that it remained to the end in its first mind and purpose respecting both provisions in the constitution containing that term. Let it be conceded, for the moment, that Mr. Dickinson was right, and that the convention had made a mistake in the use of *ex post facto*; yet the fact remains clearly established that the convention did use the term in both provisions with unchangeable intent to forbid the enactment of retroactive laws, civil as well as criminal, and particularly any law impairing the obligation of contracts. This fact ought to have caused the Supreme Court to sustain this interpretation and hold it inviolable, in accordance with that just and universally accepted principle stated at the beginning of this article.

In reality, however, Mr. Dickinson was wrong and the convention was right respecting the proper use of this term. In other words, the notion that *ex post facto* had been restricted to criminal cases, prior to the formation of our national constitution, rests on no valid basis whatever. So far as I can learn, the only authority for this alleged restriction is Blackstone. Jus-

tice Chase, in *Calder vs. Bull*,¹ makes many references to authorities, but quotes nothing definite or decisive as to what was the good legal usage of this term when the constitution was formed. Mr. Dickinson said that "in examining Blackstone's *Commentaries* he found that the term *ex post facto* related to criminal cases only." He could not have carried his examination very far, for Blackstone does not father this notion. The only passage in the *Commentaries* that we can possibly suspect of producing such an impression is in the Introduction, Section 2, where he speaks of "a rule prescribed." In commenting on the word "prescribed" and justifying the principle that all laws should be prescribed, *i.e.*, should operate *in futuro*, he cites as an example of the violation of this just principle the making of *ex post facto* laws relating to crimes. It is evident that Blackstone here applies the term *ex post facto* to criminal law, simply and solely because he wished to cite a method of "ensnaring the people" more unjust and cruel than that of the infamous Caligula just spoken of. But neither here nor elsewhere does Blackstone declare that the term *ex post facto* was, or ever had been, "limited to laws relating to crimes and criminal proceedings." From this passage Mr. Dickinson drew nothing but his own inference, and one not even natural, much less unavoidable. I say not even natural; for doubtless every lawyer in the convention had read Blackstone, but not another man of them had thought to draw the same inference. And few, if any, will protest that too high praise is given to that remarkable convention, when it is said that it contained many lawyers of eminence and several as able and erudite as ever sat on the bench of the United States Supreme Court. But Blackstone uses *ex post facto* more frequently of matters relating to property rights and civil proceedings than of matters relating to crimes and criminal proceedings.²

In Kent's *Commentary*,³ concerning Calvin's case, may be

¹ 3 Dallas, 386.

² See Cooley's Blackstone, vol. i, bk. ii, ch. 20, pp. 308, 334; ch. 22, p. 367; also ch. 16, p. 454, concerning which it is proper to say that the Roman law of marriage was an *ex post facto* law, and Blackstone so speaks of it as if he had applied the term to the law itself.

³ Vol. ii, pp. 55, 56.

found another example in good usage of the application of *ex post facto* to civil cases. The "matter *ex post facto*," as used by Lord Chancellor Ellesmere in that case, had reference to the law of descent respecting the crowns of England and Scotland. By these quoted words the Chancellor declared that the law of royal descent could not in any event acquire a retro-active power or be so applied as to work the forfeiture of vested rights of property. This shows most clearly that in 1609 A.D. the highest legal authority in England had not become aware that *ex post facto* had been "long restricted to crimes and criminal proceedings." Between this time and that of Blackstone's *Commentaries* we have a deliverance from the King's Bench, in 2 Lord Raymond, 1352 :

Raymond, Justice, called the Stat. 7 Geo. I, Stat. 2, par. 8, about registering contracts for the South Sea stock, an *ex post facto* law, because it affected contracts made before the statute.

This is quoted from the opinion delivered by Justice Chase, which is held to have given a finally authoritative definition of *ex post facto* as restricted to criminal cases.¹ But his citation plainly refutes the judge's own conclusion.

In the official letter of Roger Sherman and Oliver Ellsworth, recommending the constitution to their state, Connecticut, we have not only an example in good usage of the application of *ex post facto* to civil laws, but also the testimony of two very competent and trustworthy witnesses to the intent of the convention in the use of the term.

The restraint on the legislatures of the several states, respecting emitting bills of credit, making anything but money a tender in payment of debts, or impairing the obligation of contracts by *ex post facto* laws, was thought necessary as a security to commerce, in which the interest of foreigners as well as the citizens of different states may be affected.²

This letter was written nine days after the convention closed. Roger Sherman was present at every session of the convention

¹ *Calder vs. Bull*, 3 Dallas, 392.

² *Elliot*, I, 491 *seq.*

and prominent in all its discussions. Oliver Ellsworth was also regular in his attendance on the sessions of the convention. No man who knows the high character of these men, their eminent attainments and the distinguishing honors conferred upon them, would question their veracity or their competency as witnesses in this case. They certainly must have known what was the prevailing sentiment of the convention respecting the proper use of *ex post facto* and its constitutional intent. John Rutledge was educated at Temple Bar, London, was honored by the highest offices in the gift of his state, and was for several years a justice of the United States Supreme Court. He used "*ex post facto* law" as a substitute for a "law interfering in private contracts."¹ James Madison, preëminent in the knowledge of the law and the principles of beneficent government, called by his generation an oracle on all constitutional questions and the "Founder of the Constitution," asked the Federal Convention itself if it did not mean by "*ex post facto* law," in Article I, Section 9, to prohibit retrospective interferences in private contracts, and received a virtual answer in the affirmative by its subsequent action.² Good usage can never be proved in any case, if these eminent examples do not prove that the application of *ex post facto* to retroactive civil law was good legal usage in the time of the Federal Convention.

Are not our legal-tender laws *ex post facto*? Did they not "affect contracts made before the statute," in the language of Justice Chase? Did they not "impair the obligation of contracts," in the language of the constitution? An affirmative answer cannot be expressed in plainer language than that employed by Justice Samuel Freeman Miller, an authority against whom objection cannot with a very good grace be raised. I quote from Justice Miller's *Lectures on the United States Constitution*, page 530 :

So the statutes which declared that the treasury notes of the United States should be a lawful payment of any debt due to the government or between individuals, except for customs duties, necessarily

¹ Gilpin, 1450 ; Elliot, 488.

² Gilpin, 1444 ; Elliot, 485.

impaired the obligation of contracts, because at the time the contract was made no man was bound to take anything but gold and silver. The contract was to pay coin dollars, and, therefore, when Congress authorized the debtor to pay in legal-tender treasury notes, it impaired the obligation of his contract.

In his dissenting opinion in the case of *Hepburn vs. Griswold*,¹ Justice Miller had said, speaking of the act of February 25, 1862: "Undoubtedly it is a law impairing the obligation of contracts." And the opinion of the court in that case contains these words:

We confess ourselves unable to perceive any solid distinction between such an act and an act compelling all citizens to accept, in satisfaction of all contracts for money, half or three-quarters or any other portion less than the whole of the value actually due, according to their terms. It is difficult to perceive what act would take private property without process of law, if such an act would not. We are obliged to conclude that an act making mere promises to pay dollars a legal tender in payment of debts previously contracted, is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress, that such an act is inconsistent with the spirit of the constitution, and that it is prohibited by the constitution.

It is true that this noble decision was reconsidered and reversed; but the force of truth and justice in its words never has been and never will be impaired, while the history of that reconsideration and reversal is a page that the responsible actors therein might well wish could be sealed forever.

There is one word in the above quotation from Justice Miller that I would emphasize — the word "necessarily." The legal-tender enactments of 1862 and 1863, he said, "necessarily impaired the obligation of contracts." In the opinion delivered by Justice Gray in the case of *Juilliard vs. Greenman*,² the legal-tender enactments of those years were repeatedly represented as only *incidentally* impairing the obligation of contracts, as if this, even if it were true, would exempt them from the application of the prohibition in Article I, Section 9, of the constitu-

¹ 8 Wall, 603.

² 110 U. S. 421.

tion. That instrument, be it noted, makes no exception in favor of laws that only incidentally impair the obligation of contracts. But it is astonishing that any intelligent man should argue that the impairment of the obligation of contracts was only *incidental* to the nature and effect of the legal-tender acts of said years, when the depreciation of the notes thereby authorized to be issued was a foregone conclusion at the passage of the first act, February 25, 1862, and was an accomplished fact at the time of the joint resolution of January 17, 1863, and still more so at the passage of the act of March 3, 1863. The only reasonable object of a legal-tender clause is to impair the obligation of contracts previously made and thus to force the circulation of the notes. The legal-tender clause is of no use and is never put into exercise, except when it does impair the obligation of contracts. The legal-tender acts referred to above were intended to authorize every debtor in this country, whose obligation had been contracted prior to February 25, 1862, and would fall due before the legal-tender treasury notes came to par with gold, to defraud his creditor. So long as the notes were depreciating, other contracts also were impaired by the acts. The English common law has guarded nothing with greater zeal and vigilance than the sacredness of contracts, excepting human life itself. Indeed, this care has been found necessary to make human life itself secure. To trample on this law is no light offense. It is in vain to argue that the violation of it was necessary. It never can be necessary either to do or to authorize the doing of a single act of injustice. The constitution never permitted this, much less authorized it.

Laws impairing the obligation of contracts being embraced in the prohibition of Article I, Section 9, under the terms "*ex post facto* law," as explained by the constitution itself, by *The Federalist* and by the usage of our English ancestors long previous to the formation of the constitution, the conclusion is unavoidable that our legal-tender laws are *ex post facto*, and that Congress in enacting them violated an express provision of the constitution.

Since Justice Miller was the first and foremost advocate in the Supreme Court of the constitutionality of the legal-tender acts, certain passages in his *Lectures on the Constitution* assume much importance.

No state is permitted to make anything but gold and silver coin a legal tender in payment of debts. The object of this provision was to correct what had grown to be an enormous evil at that time, that of a debased paper currency, *in connection with the further provisions* against any state passing any *ex post facto* law, or law impairing the obligation of contracts, in order to prevent the scaling of debts, or the authorization of their payment in a depreciated and worthless paper. [Page 525.]

The above italics are mine ; for I wish to call especial attention to the fact that Justice Miller plainly regarded the clause in the constitution, "No state shall pass any . . . *ex post facto* law," as *one* of the "provisions to prevent the scaling of debts." In other words, he plainly admits that the clause, "or law impairing the obligation of contracts," is simply explanatory of "*ex post facto* law" ; for he makes the object of the two provisions precisely the same.

In the same lecture he makes some further admissions, to wit :

One of the earliest of the constitutions proposed for the confederated states contained some of the items mentioned ; for instance, as to coining money, emitting bills of credit and passing *ex post facto* laws. That branch of the instrument [Art. I, Sec. 9] had been gone over and committed to the charge of the committee on revision and style. For the purpose of preventing any interference with contracts the convention had relied very largely upon the clause prohibiting the passage of any *ex post facto* law. [Page 526.]

If the convention "relied very largely upon the clause prohibiting the passage of any *ex post facto* law" by the states, for accomplishing its "purpose of preventing any interference with contracts," what could have been its purpose and reliance six days before, when it prohibited the passage of any "*ex post facto* law" by Congress. But Justice Miller continues :

The original draft had nothing in it about the impairing of the obligation of contracts, when it was submitted to the committee. It was supposed that the expression "*ex post facto* law" necessarily included all laws bearing on past transactions, and that, therefore, with this prohibition inserted against the passage of *ex post facto* laws, no state could pass any law impairing a contract already made. [Pages 526-527.]

"Necessarily included all laws bearing upon past transactions" expresses a very firm conviction on the part of the convention respecting the proper use of *ex post facto*. If it had this conviction so late as "when the original draft was submitted to the committee," the observations of Mr. Dickinson could have made only a very superficial impression. And Justice Miller gives us no evidence to show that the convention, upon receiving the committee's report, lost its firm conviction respecting the legal import of *ex post facto*, and left its purpose in Article I, Section 9, to rely on a broken reed.

It is a just and widely accepted principle that, when a term appears with doubtful meaning in one part of a legal instrument, it is to be interpreted by that same term, if used elsewhere in the same instrument with clearer meaning or with explanatory words. Admitting that there could have been reasonable doubts as to the meaning of *ex post facto* in Section 9, the Supreme Court disregarded this just principle, in not applying to this section the conceded explanation of *ex post facto* in Section 10.

An eminent writer on law has said that "the best aid to the proper understanding and interpretation of a law is a thoughtful and patient examination of the purpose of its enactment." What purpose or object could the convention have had in view in a provision exclusively prohibiting the enactment of retro-active criminal laws? Was there any awful danger looming on the political horizon of 1787 which demanded such a safeguard? Had the Continental Congress been guilty of any such unjust legislation, or shown a disposition thereto? Were not such criminal laws merely an ancient and obsolete species of oppression? At any rate, we hear of no outcry from that time or

generation against either the colonial or the state legislatures, the British Parliament or the Continental Congress, on such grounds. But what was the one giant evil of that time, more frequently spoken of in the Federal Convention than any other political evil, more fertile of confusion and anarchy than any other one thing, more pervasive in its baneful influence through the whole body of the people, extending in its grievous effects to the humblest and most obscure, as well as to the highest? Beyond all successful contradiction, it was the impairment of the obligation of contracts by retroactive statutes. What reason had the Federal Convention to suppose, as it did suppose, that it had raised an effectual barrier against such pernicious measures, if it had merely taken the power to enact such statutes out of the hands of state legislatures and placed it in the hands of Congress? Would the mere transfer of the power to make such laws take the poison out of them? Is there such a heaven-wide difference between a small state and a large one that what was unrighteous for the former to do is righteous for the latter to do, or that what was formerly ruinous becomes beneficial by mere increase of size? Now that the Supreme Court has broken down the barriers raised by the Federal Convention against the enactment by Congress of retroactive civil laws, what bar is there against congressional enactments of installment laws, barren-land laws, laws for the occlusion of courts, legal-tender laws *ad infinitum*, and laws making criminal the future refusal to accept government paper offered for the discharge of debts? Every one of these abominations had appeared in state legislation within the recent memory of every member of the Federal Convention. Is it credible that the convention could have intended nothing more than to take the power to enact such laws from the states and hand it over undiminished to Congress? There is nothing in the abstract conception of the case that could have led the convention to suppose that this legislation would have any different result under congressional action from what had been observed under state and colonial action. And the logic of events has fully exhibited to the generation now passing off

the stage the fact that legal-tender laws have lost none of their fertility in evil fruitage. Witness the financial history of this country during the years between 1863 and 1873, with their wild speculation, extravagance, dishonesty, ruined fortunes and embittered lives.

The consideration of the purpose or object of the convention yields no support for the idea that the provision in Article I, Section 9, against *ex post facto* laws was intended to forbid retroactive criminal laws only. We are therefore obliged to conclude that, when the Supreme Court pronounced our legal-tender laws constitutional, it trampled not only on an express prohibition of the constitution but also on every sound principle of legal interpretation. In an aggravated sense was this true in the last legal-tender decision, 110 U. S. 421. Why should we any longer proclaim to the nations an intention to be dishonest at the first moment of financial perplexity or national disaster? Why should we continue to hold out to the corrupted classes in our own land, ever liable to discontent and tumults, a temptation to be dishonest, to scale and repudiate honest debts? Why not banish to an impassable distance that disturbing, corrupting, cankerous element in our national system of finance, the legal-tender treasury note? Why not make the issue of any similar note an utter and everlasting impossibility? Is it because the Republican Party is afraid to do the manly thing — acknowledge that it committed an error in the greenness of its youth? It is a manly thing, when one has erred, to acknowledge it and undo the evil, so far as power will permit.

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